72-349

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term 1972

No. 72-349

OLGA SCARPETTA,

Petitioner,

vs.

NICK F. DE MARTINO and JEAN DE MARTINO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF FLORIDA

ZALK, RUBEL & PERRET
608 Fifth Avenue
New York, New York 10020

ROSENBLATT and ROEMER, P.A.
HORTON, SCHWARTZ & PERSE
66 West Flagler Street
Miami, Florida 33130

Attorneys for Petitioner

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Petition for a Writ of Certiorari to the Supreme Court of the State of Florida

To the Chief Justice and the Associate Justices of the Supreme Court of the United States of America:

Your petitioner, Olga Scarpetta, hereby petitions this Honorable Court for a Writ of Certiorari to the Supreme Court of the State of Florida to review the order denying the petition for a rehearing and for a writ of certiorari in a habeas corpus proceeding.

Opinions and Orders Below

The decision of the Supreme Court of Florida (Appendix A,1a, infra) without opinion, is reported at 262 So.2d 442. The opinion of the District Court of Appeal of Florida, Third District (Appendix B, 2a, infra) is reported at 254 So.2d 813. The decision and judgment of the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida, is unreported (Appendix C, 5a, infra; Appendix C-1, 6a, infra).

The opinion of the Court of Appeals of the State of New York in the case of Scarpetta v. Spence-Chapin Adoption Service is reported at 28 N.Y.2d 185, 321 N.Y.S.2d 68, 269 N.E.2d 787 (1971). See Appendix D, 7a, infra. The opinion of the Appellate Division of the Supreme Court of the State of New York, First Department, is reported at 36 A.D.2d 524, 317 N.Y.S.2d 928 (Appendix E, 23a, infra). The opinion of the Supreme Court of the State of New York, New York County, of November 16, 1970 is not officially reported. It is set forth as Appendix F, 25a, infra.

On April 28, 1971, an unreported order and judgment were entered in the Supreme Court of the State of New York, New York County, directing that Spence-Chapin Adoption Service and the respondents, Nick F. De Martino and Jean De Martino, surrender petitioner's daughter to her on May 3, 1971 at Supreme Court, New York County (Appendix G, 31a, infra). An unreported order of May 27, 1971 in Supreme Court, New York County, adjudged respondents in contempt for their failure to return petitioner's daughter to the

temporary custody of the Spence-Chapin Adoption Service, subject to further order of the New York Supreme Court (Appendix H, 33a, infra).

Respondents appealed to the Supreme Court of the United States at the October Term, 1970, Number 1720, from those portions of the orders of the Court of Appeals of the State of New York which denied respondents leave to intervene as parties in the appeal pending before the New York Court of Appeals by the Spence-Chapin Adoption Service. On October 12, 1971, the Supreme Court of the United States, in an unreported opinion, dismissed the appeal for want of jurisdiction, and treating the papers on which the appeal was taken as a petition for a writ of certiorari, denied certiorari (Appendix I, 37a, infra).

Jurisdiction

The order of the Supreme Court of Florida denying a petition for rehearing was entered on June 2, 1972 (Appendix A, 1a, infra). This petition for certiorari was filed less than 90 days from said date. The jurisdiction of this Court is invoked under U.S. Sup. Ct. Rule 19, Sec. 1(b), 28 U.S.C.A. and 28 U.S.C.A., Section 1257(3).

Questions Presented

1. Are the Florida courts required to give full faith and credit to the final judgment of the New York courts that the petitioner had successfully revoked a document given to the adoption agency consenting to the adoption of her baby, and that she was entitled to custody of her child as against prospective adoptive parents with whom the adoption agency had placed the child?

2. Are the Florida courts required to give full faith and credit to a final determination by the New York courts that the petitioner was fit, competent and able to duly support and educate her child and that the best interests of the child required that custody be given to petitioner as the natural mother?

3. Are Florida's courts required to give full faith and credit to a final determination of the New York courts that the respondents, as prospective adoptive parents, did not have legal custody of the infant, and that the arrangement with the adoption agency conveyed no vested rights in the said child to the respondents as prospective adoptive parents?

4. Are the Florida courts required to give full faith and credit to the final judgment of the New York courts that had ordered a change of custody from the adoption agency, which had been vested with legal custody, to the petitioner?

5. Are the Florida courts required to give full faith and credit to a final determination by the New York courts that the best interests of petitioner's baby required the return of said child to petitioner, where there was no showing of change of circumstances other than the removal of the said child from the State of New York to the State of Florida, or of unfitness of petitioner as natural mother?

6. Should the respondents benefit from their wrong-doing in abducting petitioner's child from the State of New York and fleeing to Florida

after decisions awarding custody to petitioner were rendered, and when respondents were in contempt of a court order directing the return of her child to petitioner?

7. As between petitioner, the natural parent of the infant child, and respondents, who are strangers to the child and who never adopted the child, was petitioner deprived of due process of law in violation of the Fourteenth Amendment of the Constitution of the United States by having custody of her child placed in respondents by the Florida courts without any showing of unfitness of petitioner?

Constitutional Provisions Involved

Constitution of the United States, Article IV, Section 1.

> "Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial proceedings of every other State. And the Congress may by general Laws prescribe the Manner in which such Acts, Records and Proceedings shall be proved, and the Effect thereof."

Constitution of the United States, Amendment XIV, Section 1.

> "... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person

of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Statement of the Case

Petitioner, Olga Scarpetta, gave birth to an out-of-wedlock daughter on May 18, 1970 in New York City. Petitioner, 32 years of age, was unmarried and had become pregnant in her native Colombia. Four days after the birth of her daughter, petitioner placed the infant for boarding care with the Spence-Chapin Adoption Service in New York City, an agency authorized to receive children for adoption. About June 1, 1970, a surrender document consenting to the placement for adoption of petitioner's child was executed by petitioner to the agency, and on June 18, 1970 the baby was placed by the agency with the respondents for the purpose of adoption. Five days later, on June 23, 1970, the petitioner requested of the agency that her child be returned to her.

Pursuant to the provisions of the Domestic Relations Law of the State of New York (Appendix J, 38a, infra), petitioner did not know with whom her child had been placed. The respondents, on June 18, 1970, were residents of Brooklyn, New York, and respondent, Nick F. De Martino, was a practicing attorney in the City and State of New York.

After unsuccessful attempts to regain her child from the agency, petitioner commenced a

habeas corpus proceeding in the Supreme Court of the State of New York against the adoption agency. The New York Supreme Court, after considering all the facts, found petitioner's surrender revocable and concluded that the child should forthwith be returned to petitioner, her natural mother (Appendix F, 27a, infra). By its order and judgment of November 20, 1970 (Appendix K, 42a, infra), the trial Court ordered the return of the petitioner's daughter to petitioner, but this order was stayed pending appeal to the Appellate Division of the State of New York, First Department.

By stipulation dated November 19, 1970 (Appendix L, 44a, infra), the attorneys for petitioner, and for Spence-Chapin Adoption Service, had consented to the entry of the judgment directing the return of her child to petitioner, and staying this judgment pending appeal, on the condition that such appeal be perfected for the next available term of the Appellate Division.

The Appellate Division of the New York Supreme Court unanimously affirmed the lower court ruling on January 28, 1971, supra (Appendix E, 25a, infra). Spence-Chapin Adoption Service sought leave to appeal to the Court of Appeals of the State of New York, and for a stay pending the appeal, which was granted by the New York Court of Appeals order of February 18, 1971.

The respondents herein, Nick F. De Martino and Jean De Martino, had requested of the Court of Appeals of the State of New York leave to intervene as parties on the appeal of the Spence-

Chapin Adoption Service. This request was denied with permission to file a brief amici curiae, 28 N.Y.2d 658, (Appendix M, at 46a, infra). A stay signed by a Judge of the Court of Appeals of the State of New York continued in full force and effect under the order of the Court of Appeals of February 18, 1971, and petitioner's baby remained with the respondents.

On April 8, 1971, the New York Court of Appeals unanimously affirmed the decision of the Appellate Division of the Supreme Court of the State of New York, 28 N.Y.2d 185, 321 N.Y.S.2d 68, 269 N.E.2d 787, (Appendix D, 7a, infra).

On the day following the decision of the Court of Appeals of the State of New York, respondents fled New York with petitioner's child to the State of Florida in the Miami area.

On April 8, 1971, the day of the New York Court of Appeals decision, the respondents herein, Nick F. De Martino and Jean De Martino, commenced an action in the United States District Court for the Southern District of New York against the petitioner herein, Olga Scarpetta, and Spence-Chapin Adoption Service for a declaratory judgment that respondents were entitled to notice of all proceedings in which the right to custody of petitioner's daughter was involved, and that petitioner and the Spence-Chapin Adoption Service be enjoined from enforcing the order and judgment of the Supreme Court, New York County, entered on November 24, 1970, directing that custody of her child be awarded to petitioner.

Because of stays contained in the temporary restraining order, and subsequent orders of the Federal courts, it was not until April 28, 1971 that an order and judgment were entered in the Supreme Court of the State of New York, New York County, directing that Spence-Chapin Adoption Service and the respondents, Nick F. De Martino and Jean De Martino, surrender petitioner's infant daughter to her on May 3, 1971 in the Supreme Court, New York County (Appendix G, 31a infra). Petitioner's daughter was not surrendered to her on that date, and a motion was made in New York Supreme Court to punish the respondents for contempt.

By order of May 27, 1971, a copy of which is attached hereto in Appendix H, at 33a, infra, the respondents were adjudged in contempt.

As soon as the petitioner, Olga Scarpetta, learned the whereabouts of the respondents, she instituted habeas corpus proceedings in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida. The first hearing on the said writ of habeas corpus was held on June 11, 1971, and was concluded on June 22, 1971. The trial judge denied the writ, and directed that custody of the child remain with respondents (Appendix C-1, at 6a, infra). The Third District Court of Appeals of Florida affirmed the decision of the trial Court (Appendix B, at 2a, infra), and the Supreme Court of Florida denied petitioner's petition for a writ of certiorari, and petition for a rehearing on June 2, 1972 (Appendix A, at 1a, infra).

How Federal Questions Raised

The full faith and credit question was first raised by the pleadings in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, by petitioner's petition for a writ of habeas corpus (Appendix N, at 47a, infra).

Paragraph 3 of the said petition alleges in part that the Court of Appeals of the State of New York, as well as lower New York State courts, have recognized the petitioner as the natural mother of Lenore, and had determined that petitioner is entitled to legal custody of her child. Paragraph 16 of respondents' return to the Florida writ of habeas corpus (Appendix O, at 49a, infra), states that the New York proceedings are not entitled to full faith and credit, since the child's welfare at the time of the issuance of the writ is the sole consideration, and that matters dealing with the custody of children under the laws of this state are not entitled to full faith and credit, nor is a foreign custody decree entitled to such consideration.

The trial court denied the petition for the writ of habeas corpus, and granted custody of petitioner's infant daughter to the respondents.

The full faith and credit question was again raised by petitioner in her brief to the District Court of Appeals of Florida, Third District, portions of which are attached (Appendix P, at 58a, infra).

The opinion of the District Court of Appeal of Florida, Third District, is included at Appendix B, at 2a, infra. On petitioner's petition for a

rehearing, or suggestion for certification, the full faith and credit question was again raised (Appendix Q, at 61a, infra). That petition was denied.

The full faith and credit question was again raised in petitioner's petition for a writ of certiorari in the Supreme Court of the State of Florida, and the petition was denied (Appendix R, at 64a, infra).

On the petition for rehearing in the Supreme Court of Florida, the full faith and credit question was again raised and denied. The petition for rehearing is reproduced in part in Appendix S, at 66a, infra.

The Supreme Court of Florida denied the petition for a rehearing (Appendix A, at 1a, infra).

The question of due process of law, i.e., the denial of custody of a child to its natural mother where there is no finding of unfitness, was raised in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, the trial court in the State of Florida, in the motion for rehearing, in paragraph 2 of said motion, as follows:

> "The Court erred in granting custody to respondents, whose possession of the child is entirely illegal, and who showed neither a relevant change of circumstances since the New York decree, nor that petitioner, the natural mother, is in any way unfit to have custody of the child."

As stated above, the trial court denied the petition for the writ of habeas corpus, and awarded custody of petitioner's infant daughter to the respondents (Appendix C, at 5a, infra).

The due process of law question was raised again in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, on June 29, 1971 when the attorney for the petitioner argued his request for a rehearing. In the course of this argument he stated in part:

> "Now, I remind this Court that Miss Scarpetta's fitness and her rescission of the consent are res judicata in New York. These decisions of the New York Court are without question entitled to full faith and credit. As a matter of law the general law of this State, and of every state in the union, is that as long as the mother is fit it is presumed that the best interests of the child is with its mother.... With respect to the fitness, with respect to the type of person that Miss Scarpetta is, she is a college graduate, who has a very responsible job with a vast international corporation. She speaks three languages; and her work history has been that of helping others, teaching, advising. She has a degree, and she has expertise in the social sciences, she is financially secure, she is able to care for the baby. She has credit towards a Master's degree; and, as a matter of fact, the De Martinos and their attorneys have not really questioned in any way her fitness."

The trial judge denied the petition for rehearing.

Reasons for Granting the Writ

1. The Florida courts should have given full faith and credit to the judgment of the New York courts awarding custody to petitioner.

Habeas corpus proceedings in Florida are governed by statute. The writ is to be granted when a person is "detained in custody without lawful authority" (F.S.A. Section 79.01, Appendix T, at 68a, infra). Petitioner introduced in evidence certified copies of the orders and judgments of the New York courts. The Court of Appeals of the State of New York had decided under Section 383 of the Social Services Law (Appendix V, at 70a, infra) that petitioner had properly revoked her consent to adoption, and that she was fit, competent and able to duly maintain, educate and support her child, and that it was in the best interests of the child that custody be in the petitioner (People ex rel. Scarpetta, 28 N.Y.2d 185, 321 N.Y.S.2d 65, 269 N.E.2d 787, Appendix D, at 7a, infra). The decision that petitioner could revoke the consent to adoption, which had been granted to the Spence-Chapin Adoption Service in New York (hereinafter Spence-Chapin) was a final order and judgment of the highest court of the State of New York, and should have been given full faith and credit under Article Four of the United States Constitution, Section 1.

The custody of petitioner's infant daughter, after petitioner had signed a consent to adoption for Spence-Chapin, was in Spence-Chapin. Spence-

Chapin, on June 18, 1970, placed petitioner's baby with the respondents for the purpose of adoption. Petitioner's infant daughter was never adopted by respondents because of the timely revocation of consent by petitioner. See Section 112, Domestic Relations Law, State of New York, Appendix W, at 71a, infra.

On November 20, 1970, when the Supreme Court of the State of New York, New York County, decided that petitioner had properly revoked her consent to adoption, that she was fit, competent and able to support, maintain and educate her child, and that she was entitled to custody of her child, as opposed to Spence-Chapin, any temporary or provisional right to custody that respondents might have had from Spence-Chapin terminated (Appendices F and K, at 27a, 42a, infra).

The New York Supreme Court's order and judgment of November 20, 1970, contained a stay of the direction that Spence-Chapin surrender petitioner's infant daughter, who at that time was six months old, pending the determination of the appeal to the Appellate Division, on condition that the appeal be made promptly. This stay was based upon a stipulation between the attorneys for petitioner and for Spence-Chapin, for the benefit of the infant (see Appendix L, at 44a, infra). A judge of the New York Court of Appeals issued an additional stay pending the determination by the Court of Appeals, but this was not on consent.

When the Court of Appeals on April 8, 1971 affirmed the lower court decisions that petitioner

was entitled to custody of her child, respondents had absolutely no right of custody, and any previous provisional custody rights they may have had from Spence-Chapin had terminated. Therefore, when respondents fled New York with petitioner's infant daughter and arrived in Florida, they had no legal right to custody in the State of Florida.

Under the State of Florida habeas corpus statute, the writ is to be granted when "a person is detained in custody without lawful authority" (see Appendix T, at 68a, infra). Since there was a decision from the highest court of the State of New York deciding this very issue, respondents had no legal right to petitioner's daughter.

There could be no question that the respondents were detaining petitioner's infant daughter without lawful authority. The New York courts had determined that respondents had no right to intervene in the proceedings between petitioner and Spence-Chapin Adoption Service, and that they had no standing in court. This determination also was final and should have been given full faith and credit by the Florida courts. (See People ex rel. Scarpetta v. Spence-Chapin Adoption Service, 28 N.Y.2d, Appendix M, at 46a, infra.)

When the decision of the New York Court of Appeals was appealed to the United States Supreme Court by respondents, the Supreme Court, by its order of October 12, 1971, dismissed the appeal for want of jurisdiction, and treating the papers as a petition for a writ of certiorari, denied certiorari (Appendix I, at 37a, infra).

The Circuit Court Judge at the habeas corpus hearing in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, permitted respondents to go into the question of the welfare of petitioner's child. In denying the writ of habeas corpus filed by petitioner against respondents, he refused to give full faith and credit to the New York judgments on the legality of detention by respondents, in violation of the full faith and credit provision of the United States Constitution.

The stated purpose of the full faith and credit clause of the United States Constitution is to avoid relitigation in other states of adjudicated issues.

See Sutton v. Leib, 342 U.S. 402, 72 S. Ct. 398, 96 L. Ed. 448 (1952) and Wise v. Berman, 282 F. Supp. 282 (1967).

2. The application of full faith and credit to "custody" orders.

The Florida District Court of Appeals, Third District, justified its refusal to give full faith and credit to the judgments and orders of the New York courts by stating "A child custody order of a sister state is not entitled to full faith and credit, but may be given great weight under the doctrine of comity," citing New York ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947), and other cases.

But the "custody question" in the instant case is different from the custody question that arises

on separation or divorce of parents. Where there is a separation or divorce, each of the parents has an equal right to custody of the child. There is no basis to decide between the parents. Therefore the state as parens patriae determines the custody on the basis of the welfare of the child. (Finlay v. Finlay, 240 N.Y. 429, 148 N.E. 624, 1925.)

The best interests of the child, and the child's welfare, may change with circumstances. Therefore, most states do not regard a decree of custody between parents as final.

In Halvey v. Halvey, supra, the United States Supreme Court upheld a New York modification of a Florida decree granting absolute custody to the mother on the ground that, in Florida, custody decrees between parents are subject to modification, not only because of change of circumstances since the decree, but also because of facts not before the Court at the time of the decree. But as was pointed out above, in the instant case the New York decree determining the validity of revocation of consent to adoption and the finding that the mother was fit, competent and able to duly maintain, educate and support her child, was final.

In May v. Anderson, 345 U.S. 528, 73 S. Ct. 840 (1953), the United States Supreme Court found that Ohio was not bound by the result of a Wisconsin grant of custody to the father because there was no in personam jurisdiction over the mother. However, in the instant case, unlike May v. Anderson, only the mother had rights, far more precious than property rights. The

parties that had an interest in the case, petitioner and the adoption agency, were within the court's jurisdiction. The New York Court of Appeals had decided respondents could not intervene and had no vested rights in the child's custody (Appendix M, at 46a, infra.)

The "best interests of the child" rule is not applicable here because that rule applies only between contending parents, or custody contests between persons who claim the right of custody from parents. The present case is a contest between a parent, who has been determined to be a fit parent and able to maintain, educate and support her child, and non-parents, whom the New York courts held had no standing.

It has been argued above that denial of full faith and credit because of change of circumstances is not applicable to a contest between a parent and non-parents. But even if the "change of circumstances" test were to be applied, in the present case there could be no change of circumstances to avoid applicability of "full faith and credit." See Powell v. Powell, Fla. App. 1970, 242 So.2d 138; In re: Vermeulen's Petition, Fla. App. 1959, 114 So.2d 192.

The New York Supreme Court judgment referred to sustained the writ, and directed the Spence-Chapin Adoption Service to surrender to the petitioner, Olga Scarpetta, her baby (Appendix K, at 42a, infra). At the time of that order of November 20, 1970, custody of petitioner's daughter, as has been pointed out previously, was with the Spence-Chapin Adoption Service.

There was never any consent that custody remain with the respondents. The stipulation referred to by the Florida District Court of Appeal, Third District, in its decision on the application for a rehearing (Appendix B, at 2a, infra), did not provide that custody remain with the respondents. It provided for a stay of the judgment that custody of the infant be transferred from Spence-Chapin to petitioner (Appendix L, at 44a, infra).

The Court of Appeals decision sustaining the revocation of consent to adoption was handed down on April 8, 1971 (Appendix D, infra). The New York Supreme Court order directing Spence-Chapin and the respondents to return her baby to petitioner was dated April 28, 1971 (Appendix G, infra). The New York County Supreme Court order holding the respondents in contempt for failure to return petitioner's child was dated May 27, 1971 (Appendix H, infra). Petitioner commenced habeas corpus proceedings in Florida on June 10, 1971 with the first hearing held on June 11, 1971. The decision of the Florida court discharging the writ of habeas corpus came on June 22, 1971. There was no finding of change of circumstances in the period from May 28, 1971 to June 22, 1971, or from April 8, 1971 to June 22, 1971. There could therefor be no basis even under the custody decisions applicable between parents for a change of the New York custody decree on the basis of a change of circumstances.

3. The "clean hands" doctrine.

It is clear from the facts of this case that the respondents deliberately fled from New York

to Florida with petitioner's child for the purpose of avoiding the judgments and orders of the New York courts directing the Spence-Chapin Adoption Service and the respondents to return the child to petitioner.

By commencing an action in the United States Southern District Court of New York, with appeals to the Circuit Court of Appeals for the Second Circuit, and to the Supreme Court of the United States, respondents were able to continue stays in effect long after the initial determination of November 16, 1970 that petitioner should have custody of her child.

Respondents then argued that because 13 months had passed, and the baby had grown used to respondents, that it would be detrimental to petitioner's baby to send her back to her mother. But the passage of time was caused by the appeals in New York taken by the Spence-Chapin Adoption Service, the federal action by the respondents, the flight to Florida and the appeals after the habeas corpus proceeding was promptly brought by petitioner in Florida.

The decisions of the Florida courts have rewarded the respondents for their misconduct. To allow the respondents to prevail under the facts of the case would be a frustration of the basic policies of full faith and credit. It is a clear announcement that self-help is preferable to the judicial process in custody cases. Fear of encouraging abductions was the basis of the dissents by Justices Jackson and Reed in May v. Anderson, supra. To allow respondents to prevail in the

current situation is to encourage similar conduct by other parties to custody suits. If "full faith and credit" is not allowed to prevail, what is to prevent respondents, or others similarly situated, from running from one state to another.

4. Violation of the Due Process provisions of the Fourteenth Amendment to the Constitution.

Section 1 of the Fourteenth Amendment states in part, "Nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The effect of the decrees of the Florida courts was to transfer custody of petitioner's baby from its natural mother to the respondents. This was a determination made, not on the basis of the unfitness of the natural mother, but solely on the basis of the court's finding that the baby would be better off with respondents. Actually, the determination by Judge Cullen in the Circuit Court of the 11th Judicial Circuit, in and for Dade County, Florida, did not refer to the "best interests" rule, but stated merely that under all the facts of the case the writ of habeas corpus should be denied. (See Appendix C, C-1, infra.) There was no finding that petitioner was unfit. The respondents appeared in the Florida court with no colorable claim to petitioner's baby, except that the baby had been in their possession for 13 months. Whatever legal rights to the baby they may previously have had were based on a consent to adoption which had been given to the Spence-Chapin Adoption Service. These

legal rights, whatever their nature, were dissolved by the action of the New York courts in upholding the revocation of petitioner's consent to adoption. Nevertheless, the Florida courts found respondents custody of the baby proper.

However, even the Florida courts do not allow the removal of a child from its mother except for "improper guardianship, including abandoned, neglected and abused children" (F.S.A. 409.145, Appendix U, at 68a, infra). The Florida habeas corpus statute (Appendix T, infra), as interpreted by the courts of Florida in the instant case, permits a child to be removed from its mother on a showing of "best interests of the child" while removal of a child from a Florida citizen would require "improper guardianship," which has been interpreted to mean unfitness of the mother. Such a result is inconsistent with equal protection of the law and due process under the Fourteenth Amendment.

Conclusion

For the foregoing reasons a Writ of Certiorari should issue to review the judgment and opinion of the Florida Supreme Court on the grounds that the findings of the New York courts are entitled to full faith and credit, and that petitioner has been deprived of due process of law.

Respectfully submitted,

ZALK, RUBEL & PERRET

By s/ Joseph Zalk

ROSENBLATT and ROEMER, P.A.
HORTON, SCHWARTZ & PERSE

Attorneys for Petitioner

Appendix A - Decision of the Supreme Court of Florida

IN THE
SUPREME COURT OF FLORIDA
JANUARY TERM, A.D. 1972
FRIDAY, JUNE 2, 1972

OLGA SCARPETTA,

Petitioner,

vs.

NICK F. DeMARTINO and JEAN DeMARTINO,

Respondents.

Case No. 41,916

On consideration of the Petition for Rehearing filed by attorneys for Petitioner, and the Reply thereto,

IT IS ORDERED by the Court that said Petition be, and the same is hereby, denied.

Roberts, C.J., Ervin, Boyd and Dekle, JJ., Concur

McCain, J., Dissents

cc: Hon. W. P. Carter, Clerk
Hon. E. B. Leatherman, Clerk
A True Copy Messrs. Podhurst, Orseck & Parks
Messrs. Zalk, Rubel & Perrett and

Decision

TEST: Rosenblatt & Roemer and Horton, Schwartz & Perse
Messrs. Colson & Hicks

Sid J. White
Clerk Supreme Court

By s/_____
Deputy Clerk

(I have today mailed to the Clerk of the District Court of Appeal, Third District, Order of April 25, 1972.)

Appendix B - The Opinion of the District Court of Appeals of Florida, Third Circuit

254 So.2d 813

No. 71-745

[Same Title]

September 28, 1971

Rehearing Denied, November 30, 1971.

Habeas corpus proceeding to obtain custody of child on ground that defendants had illegal custody. The Circuit Court, Dade County, Ralph O. Cullen, J., denied petition, and petitioner appealed. The District Court of Appeal held that evidence supported ruling that best interests and welfare of child would be served by leaving her custody with defendants.

Affirmed.

* * *

Before Swann, C.J., and Pearson and Barkdull, JJ.

Per Curiam.

Olga Scarpetta filed a petition for writ of habeas corpus against Nick F. and Jean DeMartino alleging they had illegal custody of her minor child, Lenore, and she prayed for custody of Lenore. Appropriate pleadings were filed and a hearing held. The parties appeared, testimony was taken, and the petition was thereafter denied. She has appealed.

This appears to be one of those tragic situations in which one of two innocent parties must suffer. We do not attempt to assess fault or blame to either party.

We have carefully reviewed the record and briefs prepared by able counsel. The parties agree that a child custody order of a sister state is not entitled to full faith and credit but may be given great weight under the doctrine of comity. See New York ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947); Powell v. Powell, Fla. App. 1971, 242 So.2d 138; Mirras v. Mirras, Fla. App. 1967, 202 So.2d 887; Fox v. Fox, Fla. App. 1965, 179 So.2d 103; State ex rel. Fox v. Webster, Fla. App. 1963, 151 So.2d

14; Avery v. Heermance, Fla. App. 1962, 138 So. 2d 775; Foster v. Sharpe, Fla. App. 1959, 114 So.2d 373; Bachman v. Mejias, 1 N.Y.2d 575, 154 N.Y.S.2d 903, 136 N.E.2d 866 (1956); Annot., 35 A.L.R.3d 520, 561; and Ehrenzweig, Interstate Recognition of Custody Decrees, 51 Mich. L. Review, 345, 352 (1953).

We have and do give great weight and respect to the orders of sister states but we conclude, under the circumstances of this case, that the trial judge followed proper procedure and law in ruling that the best interests and welfare of Lenore were served by leaving her custody with the appellees. There is sufficient, competent and substantial evidence in the record on appeal to affirm his ruling. See Arnd't v. Prose, Fla. 1957, 94 So.2d 818; Fielding v. Highsmith, 152 Fla. 837, 13 So.2d 208 (1943); State ex rel. Weaver v. Hamans, 118 Fla. 230, 159 So. 31 (1935); Hancock v. Dupree, 100 Fla. 617, 129 So. 822 (1930); Witt v. Burford, 84 Fla. 201, 93 So. 186 (1922); McKinney v. Weeks, Fla. App. 1961, 130 So.2d 310; and 15 Fla. Jur. Habeas Corpus §62.

The order appealed herein is, therefore,

Affirmed.

ON REHEARING DENIED

Appellant has filed a vigorous and well-reasoned petition for rehearing.

Opinion

We point out that the change in circumstances and passage of time giving rise to the relationship between the baby, Lenore, and the DeMartinos occurred in great part because of appellant's consent, through her New York attorneys, that the custody of Lenore remain with the DeMartinos during the pendency of certain New York legal proceedings.

The petition for rehearing, having been considered, is denied. See Robertson v. Bass, Fla. 1906, 52 Fla. 420, 42 So. 243; and Crane v. Hayes, Fla. 1971, 253 So.2d 435.

Appendix C - Decision of the Circuit Court of the 11th Judicial Circuit in and for Dade County, Florida

Many eminent jurists have written eloquent opinions involving the same issues we have here which I could refer to. I will not.

In consideration of all the evidence in the case and the law of this state, I am constrained to the conclusion that after all is said and done, analyzing everything, that the petition should be denied and the writ discharged.

Appendix C-1 - Final Judgment

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

No. H.C. 3597

[Same Title]

This cause having come on to be heard upon the Petition for Writ of Habeas Corpus and return thereto, and the Court having heard and considered the evidence at the trial herein, it is

CONSIDERED, ORDERED and ADJUDGED that:

The Petition for Writ of Habeas Corpus be and the same is hereby denied and the Writ heretofore issued be and the same is hereby denied. Custody of the infant child, Lenore, be and the same is hereby remanded to the Respondents.

DONE and ORDERED in Chambers, at Miami, Dade County, Florida, this 24th day of June, 1971.

RALPH O. CULLEN
CIRCUIT COURT JUDGE

Appendix D - Opinion of the Court of Appeals State of New York

STATE OF NEW YORK
COURT OF APPEALS

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1. No. 79. 71

The People &c., ex rel. Olga Scarpetta on behalf of Baby Scarpetta,

Respondent,

vs.

Spence-Chapin Adoption Service,

Appellant.

JASEN, J.:

This appeal involves the return of an out-of-wedlock infant to its natural mother after she had executed a purported surrender of the child to an authorized adoption agency. The case does not involve the undoing of an adoption or the return of an adopted child to its natural parent. Nor does the case involve the undoing of a surrender by the natural mother on her mere say-so, but rather the undoing is based on a finding of fact that for various reasons, some obvious, the surrender was not made by her with such stability of

mind and emotion that the surrender should not be undone for improvidence. On the other hand, there is not the slightest suggestion that the adoption agency was unfair or guilty of any overreaching in obtaining the surrender.

It is or should be obvious that the surrender of a child by its parent, whatever the circumstances or reason, has elements of tragedy in it and that pain, feelings of guilt, and suffering will not be avoided whatever course is taken. And, of course, the foster parents who hope to adopt the child are necessarily touched by the tragedy, guiltless and otherwise uninvolved though they be, if perchance the child is wrested from them on the annulling of a surrender.

A further consideration turns on this court's limited power of review. Where, as here, findings of fact are affirmed by the Appellate Division in a civil matter, the court is bound, by constitutional mandates, to accept those facts. Only questions of law are left for its review. As a consequence, any findings of fact involved in the rendering of the surrender, turning on the mother's then state of mind, or on her fitness to rear her child, are before this court as immutable premises, from which it may only start its review of the applicable questions of law.

Opinion

The infant child was born on May 18, 1970, to Olga Scarpetta, who was unmarried and thirty-two years old. She had become pregnant in her native Colombia by a married Colombian in the summer of 1969. Seeking to minimize the shame of an out-of-wedlock child to herself and her family, Miss Scarpetta came to New York for the purpose of having her child. She was well acquainted with this country and its language. She had had her early schooling in New Jersey and her college education in California. Indeed, she had been trained in the social sciences.

Four days after the birth of the child, she placed the infant for boarding care with Spence-Chapin Adoption Service, an agency authorized by statute to receive children for adoption. Ten days later, a surrender document was executed by Miss Scarpetta to the agency, and on June 18, 1970, the baby was placed with a family for adoption. Five days later, on June 23, 1970, the mother repented her actions and requested that the child be returned to her.

After several unsuccessful attempts to regain her child from the agency, the mother commenced this habeas corpus proceeding. Before the surrender, the mother had had a number of interviews with representatives of the adoption agency.

On the other hand, shortly before or after the birth of the child, her family in Colombia, well-to-do, and devout in their religion, were shocked that she should put out her child for adoption by strangers. They assured her of their support and backing and urged her to raise her own child.

Special Term, "after considering all the facts", concluded "that the child should be forthwith returned to petitioner, its natural mother". Following unanimous affirmance by the Appellate Division, we granted leave to appeal.

The resolution of the issue of whether or not a mother, who has surrendered her child to an authorized adoption agency, may regain the child's custody, has received various treatment by the legislatures and courts in the United States.[1] At one extreme, several jurisdictions adhere to the rule that the parent has an absolute right to

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[1] See, Katz, Law of Adoption, 51 Geo. L.J. 64, 87; Comment, Revocation of Parental Consent to Adoption: Legal Doctrine and Social Policy, 28 U. Chi. L. Rev. 564.

regain custody of her child prior to the final adoption decree.[2] On the other hand, some jurisdictions adhere to the rule that the parent's surrender is final, absent fraud or duress.[3] The majority of the jurisdictions, however, place the parent's right to regain custody within the discretion of the court[4] -- the position which,

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[2] See e.g., In re Baby Girl Larson, 252 Minn. 490, but cf. Minn. Stat. § 259.24[6], [1967]; S. D. Code tit. 14, § 14.0406[1939]. In North Carolina and Tennessee, the right is continuous up until a certain period of time before the issuance of the final decree. (N.C. Gen. Stat., § 48-11 [1966]; Tenn. Code Ann., §36-117 [1962].)

[3] See, e.g., Catholic Charities v. Harper (161 Tex. 21); Gonzales v. Toma (330 Mich. 35); La. Rev. Stat. Ann. tit. 9, § 404 (1965).

[4] See, Katz (supra), n. 1 at 88.

of course, our legislature has taken. The discretionary rule allows the court leeway to approve a revocation of the surrender when the facts of the individual case warrant it and avoids the obvious dangers posed by the rigidity of the extreme positions.[5]

In New York, a surrender executed by a mother, in which she voluntarily consents to a change of guardianship and custody to an authorized agency for the purpose of adoption, is expressly sanctioned by law. (Social Services Law, §384).[6]

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5 See, Katz (supra), n.1 at 89-90; Clarke, Social Legislation, 320 [2d ed., 1957); U.S. Children's Bureau, Essentials of Adoption Law and Procedure 14 (Publication No. 331, 1949).

6 The agency is charged thereafter with the care and supervision of the child, unless the child is adopted. (Social Services Law, §383[2]; see, People ex rel. Anonymous v. Perkins Adoption Society, 271 App. Div. 672, 674.)

The statute nowhere endows a surrender with irrevocability foreclosing a mother from applying to the court to restore custody of the child to her. In fact, the legislation is clear that, until there has been an actual adoption[7], or the agency has met the requirements of the Social Services Law §384[4])[8], the surrender remains under, and subject to, judicial supervision.

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[7]Domestic Relations Law, section 112(6) provides: "Where the adoptive child is less than eighteen years of age, no order of adoption shall be made until such child has resided with the adoptive parents for at least six months unless the judge or surrogate in his discretion shall dispense with such period of residence and shall recite in the order the reason for such action."

[8]Social Services Law, section 384: "4. Upon petition by an authorized agency, a surrogate or judge of the family court may approve such surrender, on such notice to such persons as the surrogate or judge may in his discretion prescribe. No person who has received such notice and been afforded an opportunity to be heard may challenge the validity of a surrender approved pursuant to this subdivision in any other proceeding. However, this subdivision shall not be deemed to require approval of a surrender by a surrogate or judge for such surrender to be valid."

Opinion

Inherent to judicial supervision of surrenders is the recognition that documents of surrender are unilateral, not contracts or deeds, and are almost always executed under circumstances which may cast doubt upon their voluntariness or on understanding of the consequences of their execution. Indeed, no one could reasonably urge that the legislature enact a statute or that a court decide that the natural mother be prevented from establishing that her surrender was not the voluntary act of a competent person. Of necessity, therefore, there is always an issue about the fact of surrender, document or no document. On the other hand, the courts have the strongest obligation not to permit surrenders to be undone except for the weightiest reasons. And, to reflect such a view, "the legislature has gone to great pains to circumscribe, in connection with adoption, the rights of parents who have surrendered their child to an authorized agency, and * * * has gone to equal pains to define their rights to custody prior to adoption. The related statutes, which are at least presumptively an embodiment of the social judgment and consequence of the community, form a well integrated, compact and uncomplicated procedure, which bears the impress of careful thought and intelligent planning." (People ex rel. Grament v. Free Synagogue Child Adoption Committee, 194 Misc. 332, 336.)

Opinion

Having the power to direct a change of custody from the agency back to the natural parent, notwithstanding the document of surrender, the court should exercise it only when it determines "that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child." (Social Services Law, § 393[1].)[9]

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[9] Social Services Law, section 383(1):

"The parent of a child remanded or committed to an authorized agency shall not be entitled to the custody thereof, except upon consent of the court, public board, commission, or official responsible for the commitment of such child, or in pursuance of an order of a court or judicial officer of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. The name of such child shall not be changed while in the custody of an authorized agency."

Accordingly, the sole issue before us on this appeal is whether there is any evidence in the record to establish that the interest of the child will be promoted by returning the child to the natural mother.

It has repeatedly been determined, insofar as the best interests of the child are concerned, that "[t]he mother or father has a right to the care and custody of a child, superior to that of all others, unless he or she has abandoned that right or is proved unfit to assume the duties and privileges of parenthood." (People ex rel. Kropp v. Shepsky, 305 N. Y. 465, 468; see, People ex rel. Anonymous v. Anonymous, 10 N Y 2d 332, 335; People ex rel. Portnoy v. Strasser, 303 N. Y. 539, 542; People ex rel. Beaudoin v. Beaudoin, 193 N. Y. 611, affg. 126 App. Div. 505; Matter of Livingston, 151 App. Div. 1, 7; cf. Matter of Gustow, 220 N. Y. 373.) It has been well said that "the status of a natural parent" is so important that in determining the best interests of the child, it may counter-balance, even outweigh, superior material and cultural advantages which may be afforded by adoptive parents * * * * For experience teaches that a mother's love is one factor which will endure, possibly endure

after other claimed material advantages and emotional attachments may have proven transient." (People ex rel. Grament v. Free Synagogue Child Adoption Committee, supra, at 337, 338.) And, indeed, as recently as 1963, the legislature expressed its approval of this "decisional rule that between parent and non-parent, the parent is preferred." (Report of Joint Legislative Committe on Matrimonial and Family Laws [1963], Leg. Doc. No. 34, p. 91.)

The primacy of status thus accorded the natural parent is not materially altered or diminished by the mere fact of surrender under the statute, although it is a factor to be considered by the court. To hold, as the agency suggests -- that a surrender to an authorized adoption agency constitutes, as a matter of law, an abandonment -- would frustrate the policy underlying our legislation (Social Services Law, § 383[1]), which allows a mother to regain custody of her child, notwithstanding the surrender to the agency, provided, of course, that there is some showing of improvidence in the making of the surrender, that the interest of such child will be promoted and "that such parent is fit, competent and able to duly maintain, support and educate such child." Nor do we perceive any distinction, in principle, between

the effect of a surrender to an authorized agency and of a surrender to an individual. "The policy urged that, if surrender may be undone, authorized agencies will be inconvenienced or even frustrated in their placement of children is not a sufficient counterweight. The fact of relationship between a natural parent and child ought not to be subordinated to such considerations, important as they are." (People ex rel. Anonymous v. N. Y. Foundling Hosp., 17 A D 2d 122, 125, affd. 12 N Y 2d 863.)

Consequently, to give the fundamental principle meaning and vitality, we have explicitly declared that "[e]xcept where a nonparent has obtained legal and permanent custody of a child by adoption, guardianship or otherwise, he who would take or withhold a child from mother or father must sustain the burden of establishing that the parent is unfit and that the child's welfare compels awarding its custody to the nonparent." (People ex rel. Kropp v. Shepsky,

supra, at 469.)[10] In determining fitness, it is obvious that a mother who is "a drunkard, an incompetent, a notoriously immoral person, cruel or unkind towards [her] child" (Matter of Gustow, 220 N. Y. 373, 377), or whose conduct evinces indifference or irresponsibility (Matter of Cleaves, 6 A D 2d 138) would not be a proper

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10 And, in our later decision in People ex rel. Anonymous v. Anonymous (supra, at 335), we rote, in like fashion, that "where the contest for the custody of a child is between parent and nonparent, 'the primacy of parental rights may not be ignored' (People ex rel. Kropp v. Shepsky, 305 N. Y. 465, 469, supra), but it has never been held or suggested that the child's welfare may ever be forgotten or disregarded. In other words, the law presumes that it is in the child's best interests that he be raised by his natural parent, but this presumption fails when it is proved that the parent has abandoned the child or is not fit to rear him. 'The mother or father has a right to the care and custody of a child, superior to that of all others, unless', we pointed out in the Kropp case (305 N. Y. at 468), 'he or she has abandoned that right or is proved unfit to assume the duties and privileges of parenthood."

person to assume the duties of motherhood. Another significant factor to be considered is the "motivation of the mother in seeking return of the child. It is recognized that very often there is a substantial risk of improper motivation. In such case the authorized agency and the court must be especially alert not to permit the improper motivation to endanger the interests of the child or lead to any other noxious consequence. As important as this factor is, however, it is also true that the change of mind by a natural mother is not an evil thing. Instead, the change of mind is to be accorded great sympathy, and, in a proper case, encouragement and favorable action." (People ex rel. Anonymous v. N. Y. Foundling Hosp., supra.)

In no case, however, may a contest between a parent and nonparent resolve itself into a simple factual issue as to which affords the better surroundings, or as to which party is better equipped to raise the child. (People ex rel. Portnoy v. Strasser, 303 N. Y. 539.) It may well be that the prospective adoptive parents would afford a child some material advantages over and beyond what the natural mother may be able to furnish, but these advantages, passing and

transient as they are, cannot outweigh a mother's tender care and love unless it is clearly established that she is unfit to assume the duties and privileges of parenthood.

We conclude that the record before us supports the finding by the courts below that the surrender was improvident and that the child's best interest -- moral and temporal -- will be best served by its return to the natural mother.

Within twenty-three days after the child had been given over to the agency, and only five days after the prospective adoptive parents had gained provisional custody of the child, the mother sought its return. If the matter had been resolved at that time, much heartache and distress would have been avoided. However, since the child was not returned, the mother had no alternative but to commence legal proceedings to regain its custody, and this she did without delay.

In revoking the surrender and directing the return of the child to the mother, the trial court held that the mother was "motivated solely by her concern for the well-being of her child." Moreover, the evidence fully supports the conclusion that the mother "has adequately stabilized her own relationship and has become stable

enough in her own mind to warrant the return of the child to her." No finding of present or prospective unfitness has been made against the mother. On the contrary, the record discloses that she is well educated, financially secure, and in a position to properly assume the care, training and education of her child.

Concluding as we do that the record supports the determination that the child's interests will be promoted by the award of its custody to the mother, we turn to the remaining issue of whether the prospective adoptive parents were entitled to intervene in this proceeding, as a matter of law, pursuant to CPLR 1012(a)(2).

It cannot be doubted that the public policy of our state is contrary to the disclosure of the names and identities of the natural parents and prospective adoptive parents to each other.[11] Sections 383 and 384 of the Social Services Law are also reflective of this settled public policy. Since the relationship under section 384 is exclusively between the parent or parents

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[11] See, e.g., sections 111(4) and 112(4) of the Domestic Relations Law.

and the adoption agency, and the legislature has not deemed it appropriate for the prospective adoptive parents to be parties to the proceeding pursuant to section 383, the agency acts as an insulating intermediary, ensuring by the separation of the natural parents and prospective adoptive parents the secrecy necessary to prevent the strife and harassment that could be caused by a parent who institutes a proceeding merely to learn the identify of the prospective adoptive parents.

To allow the prospective adoptive parents to intervene as a matter of right, thereby assuming all the rights of other parties to the action, would necessarily lead to disclosure of the names of the natural parents and prospective adoptive parents to each other. In view of the statutory scheme enacted by the legislature, and the settled public policy, we are unwilling to hold that the prospective adoptive parents are entitled to intervene.

Similarly, we find no merit to the contention that the failure to allow the prospective adoptive parents to intervene in the instant proceeding deprived them of due process of law so as to render the court's determination awarding custody of the child to the

Opinion

mother, constitutionally invalid. The prospective adoptive parents do not have legal custody of the baby. Spence-Chapin, the adoption agency, by virtue of the mother's surrender, was vested with legal custody. (Social Services Law, §383[2]; see also, Matter of Jewish Child Care Assn. 5 N Y 2d 222, 225.) The agency, in turn, had placed the baby with the prospective adoptive parents pursuant to an arrangement reached between them, for the purpose of prospective adoption of the child. This arrangement is of course, subject to our adoption statutes, and in no ways conveys any vested rights in the child to the prospective adoptive parents. (See, e.g., Domestic Relations Law, §§112, 114.) It follows, therefore, that, in not being permitted to intervene, they are not deprived of a protected interest, as contemplated by the Constitution.

The order of the Appellate Division should be affirmed, without costs.

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Order affirmed, without costs. Opinion by Jasen,J. All concur.

Appendix E - Opinion by Appellate Division, First Department

Capozzoli, J.P., McGivern, Markewich, Nunez, JJ.

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THE STATE OF NEW YORK, ex rel.
OLGA SCARPETTA on behalf of
BABY SCARPETTA,

Petitioner-Respondent,

-against-

SPENCE-CHAPIN ADOPTION SERVICE,

Respondent-Appellant.

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Order and judgment (one paper), Supreme Court, New York County (Ascione, J.), entered on November 24, 1970, which granted petitioner-respondent's application for custody of the infant born to her on May 18, 1970, unanimously affirmed, without costs and without disbursements. This disposition must be confined in its effect to the case immediately before us. While the circumstances evoke utmost sympathy for the proposed adoptive parents, this petitioner acted without delay—indeed, about three weeks after surrender of the child for adoption (Sec. 384 subd. 1[c] Social Services Law)—by applying to respondent agency, offering to demonstrate, as she did later at Special Term, "that the interests of such child will be promoted thereby and that such parent is fit, competent and

Opinion

able to duly maintain, support and educate such child" (Sec. 383 SSL). (See discussion of this problem: People ex rel. Doe v. Edwards, 31 A.D. 2d 64, aff'd 23 N.Y.2d 925; Matter of Roe v. N.Y. Foundling Hosp., 33 A.D.2d 83; People ex rel. Anon. v. N.Y. Foundling Hosp., 17 A.D.2d 122, aff'd 12 N.Y.2d 863.) In short, as in all such cases, the welfare and interests of the child are the paramount consideration. "... [A]n authorized agency has a special obligation, completely reviewable by the courts, to consider an early change of mind by the surrendering parent with the most circumspect sympathy and consideration. The policy urged that, if surrender may be undone, authorized agencies will be inconvenienced or even frustrated in their placement of children is not a sufficient counterweight." (People ex rel. Anon. v. N.Y. Foundling Hosp., supra, at 125.)

Appendix F - Decision of Ascione, J. S. C.

SUPREME COURT

NEW YORK COUNTY

SPECIAL TERM—PART XII

Index No. 34102/1970

THE STATE OF NEW YORK, *ex rel.* OLGA SCARPETTA, on behalf of BABY SCARPETTA,

Petitioner,

—against—

SPENCE-CHAPIN ADOPTION SERVICE,

Respondent.

ASCIONE, J.:

Petitioner is an unwed mother who came to this country from South America for the prime purpose of having her child delivered here secretly, refusing a proffered abortion, and without the knowledge of her parents or sisters as to her pregnancy.

Upon contacting a hospital in New York County, she was referred to the respondent, Spence-Chapin Adoption Service. After quite a few conferences with the respondent, she agreed to give up the expected child for adoption.

The child was born on May 18, 1970, and the petitioner voluntarily surrendered her to the respondent, first by authorizing the child's placement in a foster home for boarding care on May 22, 1970, when she physically de-

livered the child to respondent, and on June 1, by executing a formal surrender, with a present consent to any future adoption.

The infant was then placed in a foster home on June 18, with a view toward subsequent adoption.

The petitioner repented her actions and, since June 23, has consistently tried to reclaim her baby, but the respondent has refused to return the child, indicating that it would resist her attempts to do so. There is no evidence that the prospective adoptive parents were notified.

The petitioner is 32 years of age, from a well-to-do family, having studied in universities here and abroad. She is employed in New York City, with a take-home pay of more than $100 weekly. Further, she has informed all the members of her family of her plight and she will now have the assistance and help of her family. An old and trusted family employee will come to this country to care for the child while petitioner is at work.

She alleges that during the period prior to and at the time she surrendered the child, she was despondent, confused and ashamed. She had not confided the moral lapse to her parents prior to the birth, fearful she would break her parents' hearts. Children, regardless of age and sophistry, do not realize that parents' hearts do not break easily. They are cut quite often, but do heal.

The issue here is not whether the petitioner can rescind the surrender of her child, but whether the child's best interests are served by its return to its natural mother (Social Service Law § 383; Peo. ex rel. Doe v. Edwards, 31 A D 2d 64, aff'd 23 N Y 2d 925) rather than with prospec-

tive adoptive parents (both of whom are professional people, with another adopted child).

Much has been said of motherly love. " • • • a fullness of love for the child; a totality of dedication to it, an all-embracing consecration that knows no wavering, no swerving. This is a mother's gift, for which, society holds, a child may well count all the world well lost." (Peo. ex rel. Gramert v. Free Synagogue, etc., 194 Misc. 332, 344.)

While it is true that the overwhelming majority of adoptive parents give of their love, many problems beset an adopted child. The knowledge of the adoption, oft-times garnered through the thoughtless cruelty of pre-teen friends, the constant subsequent mental turmoil seeking reasons for their abandonment, the curiosity concerning the natural parents and possible brothers or sisters, and at times the search.

The Court is aware of the excellently performed task of the respondent, Spence-Chapin Adoption Service, in their matching ability and their sincere efforts to find suitable and compatible homes for the adoptees, but it does appear that they acted in undue haste in the placement of the one-month-old child in this instance. The mother had indicated her revocation quite timely and consistently.

In other cases, the lack of timeliness or consistency had been a detrimental factor for the mother. (Peo. ex rel. Doe v. Edwards, 31 A D 2d 64, aff'd 23 N Y 2d 925; Peo. ex rel. Roe v. New York Foundling Hospital, 33 A D 2d 83.)

Decision

The record in this case sufficiently shows that petitioner has adequately stabilized her own relationships and has become stable enough in her own mind to warrant the return of the child to her. It appears that petitioner is motivated solely by her concern for the well-being of her child. It appears that petitioner is fit, competent and able to duly maintain, support and educate the child.

This Court suggests that if respondent desires to appeal it, do so as expeditiously as possible in order not to increase the sorrows of the prospective adoptive parents, who have had the infant through this five-month period when the infant is so ingratiating with recognitions, smiles and chuckles. In all probability, if they had known that the mother wanted the child, they would have voluntarily returned the baby.

After considering all the facts, the Court is of the opinion that the child should be forthwith returned to petitioner, its natural mother.

Settle Judgment.

Dated, November 16, 1970.

ALFRED M. ASCIONE
J.S.C.

Appendix B - Order and Judgment

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK

[Same Title]

SPENCE-CHAPIN ADOPTION SERVICE, the respondent above named, having appealed to the Court of Appeals from an order of the Appellate Division, First Department, entered in the office of the Clerk of the Appellate Division on January 28, 1971, which order affirmed an order and judgment of the Supreme Court, New York County, entered in the office of the Clerk of the County of New York on November 24, 1970, sustaining the petitioner's writ of habeas corpus, and directing that the respondent SPENCE-CHAPIN ADOPTION SERVICE surrender to the petitioner OLGA SCARPETTA the infant BABY SCARPETTA; and the Court of Appeals having, by an order entered in the office of the Clerk of said Court of Appeals on April 7, 1971, affirmed the said order of the Appellate Division without costs; and the remittitur of the Court of Appeals having been duly filed herein;

NOW, on motion of Zalk, Rubel & Perret, attorneys for the petitioner herein, it is

ORDERED, ADJUDGED AND DECREED that the respondent SPENCE-CHAPIN ADOPTION SERVICE and NICK F. DeMARTINO and JEAN DeMARTINO, the persons with whom the infant BABY SCARPETTA presently resides, surrender to the petitioner OLGA SCARPETTA said infant BABY SCARPETTA, on May 3rd, 1971 at 10:00

Order and Judgment

A.M. in Special Term, Part XII, Supreme Court, New York County, 60 Centre Street, New York, New York.

E N T E R,

s/ Alfred M. Ascione
J.S.C.

NORMAN GOODMAN
Clerk

F I L E D
APR 28, 1971
Co. Clerk's Office
New York

Appendix H - Order

At a Special Term, Part XII of the Supreme Court of the State of New York, held in and for the County of New York, at the Courthouse thereof, 60 Centre Street, New York, New York on May 27th, 1971.

P R E S E N T:

CHARLES A. LORETO,
Justice.

[Same Title]

The Petitioner, having moved this Court by an order to show cause granted May 6, 1971 and returnable May 11, 1971, and by a supplementary order to show cause granted May 7, 1971 returnable May 13, 1971, for an order punishing NICK F. DE MARTINO and JEAN DE MARTINO for contempt for their wilfull disobediance of, and non-compliance with, the order and judgment of Mr. Justice Alfred M. Ascione, made November 20, 1970 and entered November 24, 1970, ordering that respondent SPENCE-CHAPIN ADOPTION SERVICE surrender to the petitioner OLGA SCARPETTA, the infant BABY SCARPETTA, and the order and judgment of Mr. Justice Alfred M. Ascione, made and entered April 28, 1971, directing that the respondent SPENCE-CHAPIN ADOPTION SERVICE and NICK F. DE MARTINO and JEAN DE MARTINO surrender the infant, BABY SCARPETTA, to the petitioner, OLGA SCARPETTA, on May 3, 1971 at 10:00 A.M. in

Order

Special Term, Part XII of the Supreme Court, New York County, 60 Centre Street, New York, New York, in that NICK F. DE MARTINO and JEAN DE MARTINO, the persons with whom the said BABY SCARPETTA resides, have failed to obey and violated the provisions of the said orders and judgments, and said motion having regularly come on to be heard on May 13, 1971,

NOW, on reading and filing the said orders to show cause granted May 6, 1971 and May 7, 1971, the affirmations of Joseph Zalk, one of the attorneys for the petitioner herein, dated May 6, 1971 and May 7, 1971, the orders and judgments of Mr. Justice Alfred M. Ascione dated November 20, 1970 and April 28, 1971, all submitted in support of petitioner's motion, and upon the affirmation of Jacob D. Fuchsberg, dated May 11, 1971 of Fuchsberg and Fuchsberg, the attorneys for NICK F. DE MARTINO and JEAN DE MARTINO, submitted in opposition to the said motions, and after hearing counsel for both sides, and after having been advised by Jacob D. Fuchsberg, one of the attorneys for NICK F. DE MARTINO and JEAN DE MARTINO, in Chambers on May 24, 1971, that NICK F. DE MARTINO and JEAN DE MARTINO have left the State of New York with the said BABY SCARPETTA, and their attorney stated that they are no longer domiciled in the State of New York, and their whereabouts is unknown and was not disclosed, and due deliberation having been had therein, and upon filing the written decision of the Court,

NOW, on motion of Zalk, Rubel & Perret, the attorneys for the petitioner, it is

Order

ORDERED, ADJUDGED AND DECREED that the motion to punish NICK F. DE MARTINO and JEAN DE MARTINO for contempt of Court be granted to the following extent; and it is further

ORDERED, ADJUDGED AND DECREED that NICK F. DE MARTINO and JEAN DE MARTINO shall return the said BABY SCARPETTA forthwith within forty-eight hours from the date of service as herein specified to the temporary custody of the SPENCE-CHAPIN ADOPTION SERVICE, 6 East 94th Street, New York, New York, the said BABY SCARPETTA to be held in the temporary custody of the SPENCE-CHAPIN ADOPTION SERVICE subject to the further order of this Court; and it is further

ORDERED, ADJUDGED AND DECREED that service of a copy of this order with notice of entry shall be made upon Fuchsberg & Fuchsberg, 250 Broadway, New York, New York, the last attorneys of record for NICK F. DE MARTINO and JEAN DE MARTINO, and by certified mail upon NICK F. DE MARTINO and JEAN DE MARTINO at their last known home address at 8216 10th Avenue, Brooklyn, New York and said service shall be sufficient; and it is further

ORDERED, ADJUDGED AND DECREED that upon the filing of affidavit of a party hereto or his attorney of non-compliance with the provisions of this order, the respondents hereby be adjudged guilty of contempt of this court in having wilfully disobeyed its provisions; and it is further

Order

ORDERED, ADJUDGED AND DECREED under Section 750 of the Judiciary Law of the State of New York, as punishment for said contempt, pursuant to Section 851 of said statute, the said Nick P. De Martino and Jean De Martino be imprisoned in the County Jail for a period of thirty (30) days; and it is further

ORDERED, ADJUDGED AND DECREED upon the filing of affidavit of non-compliance with the provisions of this order by said Nick F. De Martino and Jean De Martino, an order of commitment may issue ex parte to the Sheriff of any county of the State of New York or of the City of New York in which they may be found, directing the said Sheriff to detain said Nick P. De Martino and Jean De Martino in his custody in the common jail of any county, and to be kept therein until their compliance with the terms of this order, or until otherwise discharged by law.

ORDERED that this order or decree may be enforced or modified only in the Supreme Court.

E N T E R

s/ CAL
J. S. C.

s/ Norman Goodman
Clerk

Filed: May 28, 1971

Appendix I - Order of the Supreme Court
October 12,1971

OFFICE OF THE CLERK
SUPREME COURT OF THE UNITED STATES
Washington, D.C.

October 12, 1971

Leo Pfeffer, Esq.
15 East 84th St.
New York, N.Y. 10028

RE: DeMartino, et ux. v. Scarpetta and Spence-Chapin Adoption Service, No. 70-178

Dear Sir:

The Court today entered the following order in the above-entitled case:

The appeal is dismissed for want of jurisdiction. Treating the papers whereon the appeal was taken as a petition for a writ of certiorari, certiorari is denied.

Very truly yours,

E. Robert Seaver, Clerk
By s/ E. T. ??
Assistant Clerk

cc: Jacob D. Fuchsberg, Esq.
250 Broadway
New York, N.Y. 10007

Joseph Zalk, Esq.
Zalk, Rubel & Perret
200 West 57th St.
New York, N.Y. 10019

Appendix J – Domestic Relations Law - State of New York

Domestic Relations Law -- State of New York (McKinney's Consolidated Laws of New York (Book 14)).

§ 114 . Order of Adoption.

If satisfied that the moral and temporal interests of the adoptive child will be promoted thereby the judge or surrogate shall make an order approving the adoption and directing that the adoptive child shall thenceforth be regarded and treated in all respects as the child of the adoptive parents or parent. In determining whether the moral and temporal interests of the adoptive child will be promoted by the adoption, the judge or surrogate shall give due consideration to any assurance by a commissioner of social services that he will provide necessary support and maintenance for the adoptive child pursuant to the social services law. Such order shall contain the full name, date and place of birth of the child in the body thereof. If the judge or surrogate is also satisfied that there is no reasonable objection to the change of name proposed, the order shall direct that the name of the adoptive child be changed to the name stated in the agreement of adoption and that henceforth he shall be known by that name. All such

Domestic Relations Law -- State of New York (McKinney's Consolidated Laws of New York (Book 14)].

orders made by a family court judge of Westchester county since September first, nineteen hundred sixty-two, and on file in the office of the county clerk of such county shall be transferred to the clerk of the family court of such county. Such order and all the papers in the proceeding shall be filed in the office of the court granting the adoption and the order shall be entered in books which shall be kept under seal and which shall be indexed by the name of the adoptive parents and by the full original name of the child. Such order, including orders heretofore entered, shall be subject to inspection and examination only as hereinafter provided. The fact that the adoptive child was born out of wedlock shall in no case appear in such order. The written report of the investigation together with all other papers pertaining to the adoption shall be kept by the judge or surrogate as a permanent record of his court and such papers must be sealed by him and withheld from inspection. No certified copy of the order of adoption shall issue unless authorized by court order, except that certified copies may issue to the agency or agencies in the proceeding

prior to the sealing of the papers. Before the record is sealed, such order may be granted upon written ex parte application on good cause shown and upon such conditions as the court may impose. After the record is sealed, such order may be granted only upon notice as hereinafter provided for disclosure or access and inspection of records. The clerk upon request of a person or agency entitled thereto shall issue certificates of adoption which shall contain only the new name of the child and the date and place of birth of the child, the name of the adoptive parents and the date when and court where the adoption was granted, which certificate as to the facts recited therein shall have the same force and effect as a certified copy of an order of adoption.

No person, including the attorney for the adoptive parents shall disclose the surname of the child directly or indirectly to the adoptive parents except upon order of the court. No person shall be allowed access to such sealed records and order and any index thereof except upon an order of a judge or surrogate of the court in which the order was made or

of a justice of the supreme court. No order for disclosure or access and inspection shall be granted except on good cause shown and on due notice to the adoptive parents and to such additional persons as the court may direct.

In like manner as a court of general jurisdiction exercises such powers, a judge or surrogate of the court in which the order of adoption was made may open, vacate or set aside such order of adoption for fraud, newly discovered evidence or other sufficient cause. As amended L.1968, c.320, eff. Sept. 1, 1968, c.365; L1968, c.1038, § 4; L.1970, c. 570, § 6, eff. Sept. 1, 1970.

Appendix K - Order and Judgment Appealed From

At a Special Term, Part XII of the Supreme Court of the State of New York, held in and for the County of New York, at the County Courthouse in the County of New York on the 20th of November, 1970.

Present:

HON. ALFRED M. ASCIONE,

Justice.

THE STATE OF NEW YORK, *ex rel.* OLGA SCARPETTA, on behalf of BABY SCARPETTA,

Petitioner,

—against—

SPENCE-CHAPIN ADOPTION SERVICE,

Respondent.

The Writ of Habeas Corpus issued by the Honorable Arnold L. Fein, Justice of the Supreme Court of the State of New York, County of New York, on the 21st day of September, 1970, having come on for hearing at a Special Term, Part XII of this Court on the 2nd day of November, 1970, and a hearing having been held upon said Writ of Habeas Corpus on the 2nd day of November, 1970, and the Petitioner herein, having appeared herein by its attorneys, Zalk, Rubel and Perret, Joseph Zalk, Esq., of counsel, and

the Respondent herein, having appeared herein by its attorneys, Simpson Thacher & Bartlett, Roy L. Reardon, Esq., and James Wawro, Esq., of counsel, and the proofs of all parties having been taken and their respective counsels having been heard, and the Court, after due deliberation, having made and filed a decision in writing dated November 16, 1970, awarding custody of Baby Scarpetta to the Petitioner, Olga Scarpetta, from the custody of the Respondent, The Spence-Chapin Adoption Service,

AND, upon reading and filing the aforesaid Writ of Habeas Corpus, the Petition of Olga Scarpetta, sworn to September 18, 1970, and the Return of the Respondent, The Spence-Chapin Adoption Service, duly sworn to on the 27th day of October, 1970, by Loyce W. Bynum, and Petitioner's Exhibit 1 and Respondent's Exhibit A (consisting of 3 papers);

Now, upon motion of Simpson Thacher & Bartlett, attorneys for the Respondent herein, it is

ORDERED, ADJUDGED AND DECREED that the writ is sustained and Respondent The Spence-Chapin Adoption Service, surrender to the Petitioner, Olga Scarpetta, the infant, Baby Scarpetta, and it is further

ORDERED, ADJUDGED AND DECREED that the execution of this judgment be stayed pending the determination of the appeal of The Spence-Chapin Adoption Service from this judgment, to the Appellate Division, First Department, on

Order and Judgment

condition that such appeal is perfected for the next avail
able term of such Court, on consent by stipulation date
November 19, 1970.

ENT
ER,

A. M. A.
J.S.C.

NORMAN GOODMAN
Cler

FILED
Nov 24 1970
COUNTY CLERK'S OFFICE
NEW YORK

Appendix L - Stipulation Staying Enforcement of Judgment

BY HAND

November 19, 197

Re: Scarpetta v. Spence-Chapin
Index No. 34010/70

Honorable Alfred M. Ascione
Supreme Court of the State of New York
County of New York
Special Term Part XII
60 Centre Street
New York, New York

Stipulation

Dear Judge Ascione:

After fully discussing the appeal of this proceeding with our respective clients, we wish to respectfully inform you that both parties consent to the entry of the annexed judgment and the stay of this judgment pending appeal on condition that such appeal be perfected for the next available term of the Appellate Division, First Department.

Respectfully yours,

SIMPSON, THACHER & BARTLETT

By Roy L. Reardon
Attorneys for Respondent
The Spence-Chapin
Adoption Service

ZALK, RUBEL & PERRET

By Joseph Zalk
Attorneys for Petitioner
Olga Scarpetta

JW:mkb

Appendix M - Request for Leave to Intervene

THE PEOPLE OF THE STATE OF NEW YORK ex rel. OLGA SCARPETTA, on Behalf of Baby Scarpetta, Respondent, v. SPENCE-CHAPIN ADOPTION SERVICE, Appellant.

Submitted February 8, 1971; decided February 18, 1971. Reported below, 36 A.D.2d 524.

Motion by Nick F. and Jean De Martino for leave to intervene as parties on the appeal herein denied; movants, however, may file a brief amici curiae if they be so advised.

Motion by Adoptive Parents Committee, Inc. for leave to file a brief amicus curiae and to participate in the oral argument of the appeal herein granted only to the extent that a brief may be filed.

Appendix H - Petition for Writ of Habeas Corpus

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

No. H.C. 3597

- - - - - - - - - - - - - - - - -x

OLGA SCARPETTA, :

Petitioner, :

vs. :

NICK F. DeMARTINO and JEAN DeMARTINO, :

Respondents. :

- - - - - - - - - - - - - - - - -x

Comes now the Petitioner, Olga Scarpetta, by and through her undersigned attorneys, and files this her Petition for Writ of Habeas Corpus:

1. Petitioner is Olga Scarpetta, natural mother of Lenore, who was born on May 18, 1970.

2. The child is now in the illegal possession and control of the Respondents, Nick F. DeMartino and Jean DeMartino, at an unknown address in Dade County, Florida.

3. Petitioner has repeatedly demanded that Respondents surrender to her the person of her child, but Respondents have refused and still

refuse to do so. The Court of Appeals of the State of New York as well as lower New York State Courts have recognized the Petitioner as the natural mother of Lenore and have determined that she is entitled to legal custody of her child.

4. The Respondents are not related by blood to the Petitioner's child and they have never legally adopted said child. They have possession of Lenore against the wishes of the child's natural mother.

5. On or about May 1, 1971, the Respondents fled the jurisdiction of the State of New York and its Courts in order to retain illegal possession and control of the Petitioner's child.

6. The child is held and deprived of her liberty without proper legal authority. The Respondents hold, retain and assert custody of the child over the objections of the Petitioner. The custody is illegal and invalid and unless relief be granted by this Court, the child will continue to be confined and deprived of her liberty.

WHEREFORE, Petitioner prays for a Writ of Habeas Corpus commanding the Respondents, Nick F. DeMartino and Jean DeMartino, to bring the child before the Court so that lawful custody of her person be granted the Petitioner.

STANLEY ROSENBLATT and
MALLORY H. HORTON
Suite 400, Concord Building
66 West Flagler Street
Miami, Florida 33130

ZALK, RUBEL and PERRET
200 West 57th Street
New York, New York 10019

Attorneys for the Petitioner.

Appendix O - Return to Writ of Habeas Corpus and Answer and Response to Writ and Petition

IN THE CIRCUIT COURT OF THE 11th JUDICIAL CIRCUIT IN AND FOR DADE COUNTY, FLORIDA

No. H.C. 3597 (Cullen)

[Same Title]

COME NOW the respondents, NICK DE MARTINO and JEAN DE MARTINO, through undersigned counsel and file this their Return to the Writ of Habeas Corpus; and their Answer and Response to the Writ and Petition herein and aver:

1. The respondents herein lawfully and legally obtained custody of the child, Lenore, preparatory to lawful adoption in the State of New York.

Return to Writ

2. The petitioner, then a mature adult woman, 32 years of age, surrendered the person of her child Lenore, to the Spence-Chapin Adoption Agency in New York, with is principal office at 6 E. 94th Street, New York, New York.

3. The petitioner herein, the natural mother of the infant female, gave birth to said infant female, Lenore, out of wedlock, on May 18, 1970 in New York Hospital, New York, New York.

4. The petitioner on information and belief surrendered the infant to the Spence-Chapin Agency on May 22, 1970, and consented to the placement of said child for boarding care. Thereafter on June 1, 1970, the petitioner voluntarily and unconditionally surrendered the custody of said child to Spence-Chapin, with ultimate adoption of the child in mind, in accordance with the laws of the State of New York.

5. The decision to surrender the custody of the child and to actually place it for adoption was considered and maturely reflected upon and the formal surrender document was in no way executed under duress or by virtue of fraud.

6. Upon information and belief, the petitioner has not even seen the child since the time of its birth.

7. Your respondents were given custody of the child on June 18, 1970, and the child has remained with them since that time and has lived in their home and they are in loco parentis.

Return to Writ

8. The petitioner applied for a Writ of Habeas Corpus in the State of New York and reobtained custody of her child and sought to revoke the consent. That Writ was issued on September 21, 1970 and resulted in a favorable determination which proceeded through the New York court system to the New York Court of Appeals. The decision is now pending in the U.S. Supreme Court, through appellate proceedings instituted by the De Martinos.

9. The DeMartinos, your respondents, were not permitted to intervene in the cause in New York which was litigated solely between the petitioner and the Spence-Chapin Agency under the peculiar aspects of the New York law.

10. Your respondents have never been given the opportunity to be heard, nor has the welfare of the child and the best interests of the child ever been litigated or evidence thereon presented; the trial in New York in which the DeMartinos were not participants, included no testimony of the condition, physical, mental or emotional, of Lenore, or of the DeMartinos, or of the situation in their home, or of the effect on Lenore of a forced dismemberment of the only home Lenore has ever known.

11. The DeMartinos, your respondents, subsequent to the New York Court of Appeals decision, have permanently moved to the State of Florida and now reside here. In Florida the court is not bound by any technical legal right of the

parent, but must give the parent's claim only that consideration to which it is entitled under the peculiar circumstances of the case; but in a case such as this involving an infant like Lenore, the matter of the Writ is not decided on the legal right of the infant to be relieved from unlawful imprisonment and detention as in the case of an adult, but the custody of the child must be based upon the welfare of the child and the best interests of the child at the time of the Writ; the child's welfare is the supreme consideration.

12. Your respondents obtained custody lawfully and legally and have never before been afforded an opportunity to be heard concerning their right to custody which was summarily determined as to them under the New York procedures; the best interests and welfare of the child at this time and at the time of the issuance of the Writ clearly dictate that custody remain with your respondents who have provided the infant Lenore with the only home she has ever known; and your respondents are the only parents that Lenore has ever known. Your respondents contend that medical psychiatric and psychological testimony clearly will dictate that the welfare of the child Lenore mandates that custody remain where it is at this time.

13. Your respondents have at all times attempted to obtain a hearing on the merits concerning the welfare of Lenore with regard to her custody, but have been denied their day in court to this point. Indeed they instituted Federal Court proceedings in the State of New York, contending that they were

not afforded the right to be heard and that proceeding is presently pending in the U. S. Supreme Court.

14. Petitioner had a wide range of alternatives readily available to her when she surrendered the child, but Petitioner insisted upon surrendering her child after careful counseling and advice, and she voluntarily secured this alternative from the variety of choices she had.

15. The respondents have afforded the child a normal home with loving care. There is a sister, an adopted child, four years old, who likewise has formed close emotional ties with the infant Lenore. Separation at this time of Lenore from her sister as well as those whom she knows as her parents would have harsh effects upon the emotional security of the infant. The best interests of the child can only be served and enhanced by her continuing in the custody of respondents, her loving foster parents. A return of the child to the custody of the petitioner whose personal and family future is so uncertain is not in the best interests of this child. On information and belief, the petitioner has no present plans to marry, will be unable to spend her days with the child; and will require a nurse to care for the child during the day. The respondent, Jean DeMartino, on the other hand, is a loving housewife and mother who will be available to tend to the child's needs as she has done since shortly after the child's birth; and the child likewise will have the company and emotional relationship with her sis-

ter; and will have the support, guidance and training of a loving, responsible father as she has had since shortly after the time of her birth.

16. The New York proceedings are not entitled to full faith and credit since the child's welfare at the time of the issuance of the Writ is the sole consideration and matters dealing with the custody of children under the laws of this state are not entitled to full faith and credit, nor is a foreign custody decree entitled to such consideration.

17. This is particularly true where, as here, your respondents never have been afforded the opportunity to be heard nor has there been any meaningful testimony on the best welfare of the child. For all practical purposes the New York courts only considered a presumption that the welfare of the child dictated its return to the natural mother — a view which is not supported in this case by the medical, emotional psychiatric and psychological factors.

18. Moreover, conditions have changed since the Writ was granted in New York in that the child has matured and now is fully aware of its relationship with your respondents and the welfare of the child at this time clearly dictates that she remain where she is.

19. The petitioner voluntarily surrendered and abandoned the baby Lenore and your respondents only received notice that she intended to obtain custody of the infant immediately prior to the

trial on the New York petition for Writ of Habeas Corpus, on November 2, 1970. At that juncture the child was almost six months of age. The efforts of your respondents to intervene in the New York courts have been denied. Deprivation of their custody without a full hearing on the merits would deprive them of due process of law under the Fourteenth Amendment to the U. S. Constitution and the Due Process Clause of the Florida Constitution. A hearing on the best interests of the child with the DeMartinos participating will clearly reflect that the welfare of the infant demands continued custody in the De Martinos. The petitioner after over a dozen consultations with social agencies throughout her pregnancy and after being advised to consider her surrender carefully prior to consummating it, nevertheless determined to execute it and irrevocably to surrender the baby. By the time the DeMartinos became aware that she sought to revoke her surrender, the child had been with them for a period of months and the parent child emotional relationship already was well established. Custody should remain herein with the respondents who lawfully obtained that custody; the welfare of the child requires this.

WHEREFORE, the Writ of Habeas Corpus heretofore granted should be discharged and the Petition dismissed upon a full evidentiary hearing concerning the best welfare of this infant.

Response and Answer to Writ and Petition

Return to Writ

Your respondents, in response and answer to the Writ and Petition herein aver:

1. Admit on information and belief the allegations of Paragraph 1 of the Petition.

2. Deny the allegations in Paragraph 2 except admit possession and custody of the child in Dade County, Florida.

3. Deny the allegation that the petitioner has repeatedly demanded that respondents surrender the child to her; admit that the New York court system has recognized petitioner as the natural mother of Lenore; and admit that that court system thus far has determined that petitioner is entitled to legal custody of the child as between the Spence-Chapin Agency and the mother; but state that that decision is not binding upon the respondents; that they were not parties thereto; that they were not afforded the opportunity to be heard; that as to them deprivation of custody based upon the New York litigation would violate their constitutional rights under both the Federal and Florida constitutions to due process of law and the opportunity to be heard; and further deny that the New York decision is entitled to full faith and credit here or to comity consideration; in that at the present time and at all times the best welfare of the child dictates that custody remain with your respondents, an issue which was not sufficiently litigated in the New York proceedings.

Return to Writ

4. The respondents admit the allegations of Paragraph 4 that they are not related by blood to the child and have not as yet adopted said child; they likewise admit custody of Lenore against the wishes of the child's natural mother, but aver that they obtained lawful custody of the child and that the best welfare of the child requires continued custody in them; and aver that they plan to adopt said child and aver that the wishes of the natural mother-petitioner at this time are not conclusive or binding upon your respondents or Lenore.

5. Your respondents unequivocally deny the allegations of Paragraphs 5 and 6 of the Petition.

WHEREFORE it is respectfully requested that the Writ be discharged and the Petition be dismissed.

CLAIM OF RESPONDENTS

The respondents repeat and re-allege each and every allegation of this pleading as if set forth at length and assert that the welfare of the child mandates on their continued custody of the child and this court should so order.

Return to Writ

WHEREFORE the Writ should be discharged and the Petition dismissed and custody remanded to your respondents.

COLSON & HICKS, P. A.
and
PODHURST ORSECK & PARKS, P.A.

By _____
Attorney for Respondents

Appendix P - Portions of Petitioner's Brief

IN THE DISTRICT COURT OF APPEAL
OF FLORIDA THIRD DISTRICT

NO. 71-745

[Same Title]

* * *

ARGUMENT

DID THE TRIAL COURT ERR IN AWARDING THE INFANT CHILD TO STRANGERS RATHER THAN THE NATURAL MOTHER.

Judgments of foreign states relating to the custody of minor children are generally not accorded enforcement under the full faith and credit clause of the United States Constitution but such judgments are recognized and given great weight under the doctrine of comity. In the recent case of Powell v. Powell, Fla. App. 1971, 242 So.2d

138, the First District Court of Appeal in a habeas corpus proceeding brought to determine the custody of a minor child, had under consideration there a temporary order of a court of the State of Louisiana. The Louisiana Court had placed custody of the minor child in the husband. The First District Court of Appeal in commenting on the recognition that should be accorded the Louisiana judgment said:

> "Although the Louisiana judgment does not require enforcement in Florida under the full faith and credit clause, it is entitled to great weight and respect under the doctrine of comity absent a showing by clear and convincing evidence that such new conditions have arisen since rendition of the decree as would justify a change in custody."

The highest court of resort in the State of New York found that the Appellant was fit, competent and able to maintain, support and educate her child and further, that she was the natural mother of the infant child. In addition, it rescinded the consent which she had given to the child placing agency for the adoption of the child and directed the surrender of the child to her by those having its custody. Such findings and adjudication by the court of a sister state should not be disregarded, as it was here, but should be accorded recognition and enforcement under the principals of comity especially so where, as here, the New York adjudication was of such recent vintage. See Neal v. State, Fla. App. 1961, 135 So.2d 891 and Marrio v. Kridel, Fla. App. 1965, 179 So.2d 130, 133.

Portions of Petioner's Brief

The dilemma that had been created by the Florida trial court's denial of the Appellant's Petition for Habeas Corpus, is accentuated by the fact that the New York court adjudicated that the Appellant's consent for adoption given to the child placing agency who could in turn give a consent to specific persons such as the Appellees for the adoption of the infant child, was rescinded. That issue should now be res judicata, see McClay v. McClay, Fla. 1947, 2 So.2d 361, or at least the Appellees should be estopped by the New York Judgments. See Gordon v. Gordon, Fla. 1952, 59 So.2d 40 and Reynolds v. Reynolds, Fla. App. 1959, 117 So.2d 16, 21. Therefore, the Appellees are not in a position to adopt the infant child unless they go into an adversary proceeding against the natural mother.

The New York court further, in its judgment as previously stated, found the Appellant to be fit and competent and that adjudication is of recent vintage. It is only when there is a change in circumstances relating to the fitness of the person awarded custody by the foreign court that the judgment may be departed from in Florida.

* * *

No one in these proceedings has attacked the finality of that portion of the New York Judgment that rescinded the Appellant's consent to adoption given to the child placing agency and the fact that the Appellant is the natural mother of the child and a fit and proper person to have her child's

custody. The only area inquired into by the Florida trial court was whether or not it would be to the best interest of the minor child to have her returned to her natural mother or for her to remain in the possession of the Appellees. The trial judge found that it would be for the best interest of the child to remain with the Appellees, and on the contrary implicitly found it would cause the child to suffer some trauma if she was taken away from Appellees at this time.

* * *

Appendix Q - Portions of Petition for Rehearing or Suggestion for Certification

IN THE DISTRICT COURT OF APPEAL OF FLORIDA, THIRD DISTRICT.

No. 71-745

[Same Title]

COMES NOW the appellant, OLGA SCARPETTA, by her counsel, and pursuant to Rule 3.14, Florida Appellate Rules, and within the time provided therein, files this her petition for rehearing, directing this Court's attention to its opinion and decision filed September 28, 1971, and as grounds for such petition, says:

1. The Court may have overlooked and failed to consider the fact that, although the law of Florida as it relates to child custody matters,

does not accord decrees relating to custody full faith and credit, nevertheless, full faith and credit under the Federal Constitution should have been accorded the provisions of the New York judgment which found that the appellant had validly rescinded her consent to custody and adoption given to the Spence-Chapin child placing agency. Further this Court may have overlooked and failed to consider the fact that the New York judgment was also conclusive and entitled to full faith and credit on the finding made by the New York Court that the appellant was a fit and proper person to have the custody of her minor child.

2. That this Court may have overlooked and failed to consider the application of the decision and rationale in the case of POWELL v. POWELL, Fla. App. 1971, 242 So.2d 138, in the First District Court of Appeals. The POWELL case involved a habeas corpus proceeding brought to determine the custody of a minor child under a temporary order issued out of the State of Louisiana. The First District Court of Appeals said:

> "Although the Louisiana judgment does not require enforcement in Florida under the full faith and credit clause, it is entitled to great weight and respect under the doctrine of comity absent a showing by clear and convincing evidence that such new conditions have arisen since the rendition of the decree as would justify a change in custody."

Portions of Petition

There was no clear and convincing evidence that new conditions had arisen since the New York judgment as would justify the continued denial of the appellant to her child. The only condition that changed was that the appellees by their continued flouting of the New York judgment were permitted to cement their relationship with the appellant's minor child and to create a barrier which the trial court and this Court has now cemented by their judgments and decrees.

3. That this Court may have overlooked and failed to consider the clear holding of the First District Court of Appeal in the case of IN RE: VERMEULEN'S PETITION, Fla. App. 1959, 114 So.2d 192.

* * *

Since the appellant as the natural mother had a right under New York law to rescind her consent to custody as well as to adoption, and she properly and legally rescinded, she was entitled to the return of her child and the New York Court so held. The judgment of the trial court and this Court's opinion confirming the same is an open invitation to persons so inclined as were the appellees to whisk minor children from one jurisdiction to another without lawful authority and by the mere passage of time gaining the legal custody of the minor child through their illegal actions.

* * *

Portions of Petition

Respectfully submitted,

HORTON, SCHWARTZ & PERSE
and
ROSENBLATT & ROEMER
and
Zalk, Rubel & Perret
410 Concord Building
Miami, Florida 33130
Attorneys for Appellant

By:_____
Mallory H. Horton

I DO HEREBY CERTIFY that a true copy of the foregoing Petition for Rehearing was mailed to COLSON & HICKS, 66 West Flagler Street, Miami, Florida 33130, this 12th day of October, 1971.

_____
Mallory H. Horton

Appendix R - Portions of Petition for Writ of Certiorari to the District Court of Appeal, Third District

IN THE SUPREME COURT OF THE STATE OF FLORIDA

[Same Title]

To the Supreme Court of the State of Florida:

Portions of Petition

Petitioner, OLGA SCARPETTA, presents this her Petition for Writ of Certiorari and states:

* * *

6. On the foregoing facts the District Court of Appeal was presented with the following Point of Law:

> "Did the trial court err in awarding the infant child to strangers rather than the natural mother."

On the foregoing Point of Law the District Court of Appeal, Third District, rendered the following decision or holding:

> "We have carefully reviewed the record and briefs prepared by able counsel. The parties agree that a child custody order of a sister state is not entitled to full faith and credit, but may be given great weight under the doctrine of comity. See New York ex rel. Halvey v. Halvey, 330 U.S. 610, 67 S. Ct. 903, 91 L. Ed. 1133 (1947); Powell v. Powell, Fla. App. 1971, 242 So.2d 138; Mirras v. Mirras, Fla. App. 1967, 202 So.2d 887; Fox v. Fox, Fla. App. 1965, 179 So.2d 103; State ex rel. Fox v. Webster, Fla. App. 1963, 151 So.2d 14; Avery v. Heermance, Fla. App. 1962, 138 So.2d 775; Foster v. Sharpe, Fla. App. 1959, 114 So.2d 373; Bachman v. Mejias, 1 N.Y.2d 575, 154 N.Y.S.2d 903, 136 N.E.2d 866; Annot., 35 A.L.R.3d 520, 561; and Ehrenzweig, Inter-

state Recognition of Custody Decrees, 51 Mich. L. Review, 345, 352 (1953).

"We have and do give great weight and respect to the orders of sister states but we conclude, under the circumstances of this case, that the trial judge followed proper procedure and law in ruling that the best interests and welfare of Lenore were served by leaving her custody with the appellees. There is sufficient, competent and substantial evidence in the record on appeal to affirm his ruling. See Arnd't v. Prose, Fla. 1957, 94 So.2d 818; Fielding v. Highsmith, 152 Fla. 837, 13 So.2d 208 (1943); State ex rel. Weaver v. Hamans, 118 Fla. 230, 159 So. 31 (1935); Hancock v. Dupree, 100 Fla. 617, 129 So. 822 (1930); Witt v. Burford, 84 Fla. 201, 93 So. 186 (1922); McKinney v. Weeks, Fla. App. 1961, 130 So.2d 310; and 15 Fla. Jur. Habeas Corpus §62."

* * *

Appendix S - Portions of Petition for Rehearing

IN THE SUPREME COURT OF FLORIDA

No. 41,916

[Same Title]

COMES NOW the Petitioner, OLGA SCARPETTA, by her counsel and pursuant to Rule 3.14, Florida Appellate Rules, and within the time

provided therein, files this her Petition for Rehearing directed to this Court's Order of April 25, 1972 denying her Petition for Certiorari and as grounds for such Petition says:

1. The Court may have overlooked and failed to consider the fact that although morally the petitioner should never have temporarily relinquished her child to a child placing agency, nevertheless the Courts of the State of New York in an adversary proceeding there decided as a matter of law and fact that the petitioner had just cause and could validly and did validly rescind her consent. The New York Judgment in this regard we respectfully suggest is entitled to full faith and credit under the Federal Constitution. Likewise is the Judgment of the New York Courts conclusive and entitled to full faith and credit in finding that the petitioner was a fit and proper person to have custody of the minor child. At least such finding was entitled to full faith and credit as of the time of the entry of the New York Judgment. In addition, this Court may have overlooked and failed to give to the New York Judgment the degree of comity which should have been accorded it as to the fitness of the petitioner where during the time that had elapsed between the finding in the New York Court and the instigation of habeas corpus proceedings in Florida there was no change in the petitioner's fitness.

Appendix T - The Florida Habeas Corpus Statute

Florida Statutes Annotated, Section 79.01 HABEAS CORPUS, Application and Writ:

Whenever any person detained in custody, whether charged with a criminal offense or not, shall, by himself or by some other person in his behalf, apply to the supreme court of the state or to any justice thereof, or to any circuit judge, in vacation or in term time, for a writ of habeas corpus, and shall show by affidavit or evidence probable cause to believe that he is detained in custody without lawful authority, the court, the justice or judge to whom such application shall be made forthwith shall grant the writ, signed by himself, directed to the person in whose custody the applicant is detained, and returnable immediately before such court, justice or judge, or any of said courts, justices or judges, as the writ issued may direct.

Appendix U - Florida Social Welfare Statute

Laws 1969, c. 69-268, §1, eff. July 3, 1969. Amended by Laws 1969, c. 69-106, §§19, 35; Laws 1970, c. 70-255, §1, eff. June 30, 1970.

409.145 Care of children

(1) The following children shall be subject to the protection, care, and guidance of the division or any duly licensed public or private agency:

(a) Children with improper guardianship, including abandoned, neglected, and abused children.

Florida Social Welfare Statute

(b) Destitute or dependent children.

(c) Mentally retarded or physically handicapped children.

(d) Emotionally disturbed children.

(2) The juvenile courts of the various counties of this state shall cooperate with the division and its employees in carrying out the purposes and intent of this chapter. However, no child shall be taken away from its parents or guardians except after a judicial hearing or proceeding before a court of competent jurisdiction and after notice to such child's parents or guardians of such judicial hearing or proceeding or except by the written consent of said child's parents or guardians.

(3) The division is authorized to provide adoption services and to accept permanent commitment of children by order of a court of competent jurisdiction for the purpose of adoption placement of said children.

(4) Any funds appropriated by counties for child welfare services may be matched by state and federal funds, such funds to be utilized by the department for the benefit of children in said counties.

Appendix V - Social Services Law of the State of New York

Social Services Law of the State of New York (McKinney's Consolidated Laws of New York, Book 52-A).

§ 383. CARE AND CUSTODY OF CHILDREN

1. The parent of a child remanded or committed to an authorized agency shall not be entitled to the custody thereof, except upon consent of the court, public board, commission, or official responsible for the commitment of such child, or in pursuance of an order of a court or judicial officer of competent jurisdiction, determining that the interest of such child will be promoted thereby and that such parent is fit, competent and able to duly maintain, support and educate such child. The name of such child shall not be changed while in the custody of an authorized agency.

2. The custody of a child placed out or boarded out and not legally adopted or for whom legal guardianship has not been granted shall be vested during his minority, or until discharged by such authorized agency from its care and supervision, in the authorized agency placing out or boarding out such child and any such authorized agency may in its discretion remove such child from the home where placed or boarded. L.1940, c. 619, §3, eff. March 1, 1941.

Appendix W – Portions of Domestic Relations Law-State of New York

Portions of Domestic Relations Law -- State of New York (McKinney's Consolidated Laws of New York (Book 14)).

§ 112. GENERAL PROVISIONS RELATING TO ADOPTION FROM AUTHORIZED AGENCIES.

In an adoption from an authorized agency the following requirements shall be observed:

* * * * * *

3. The authorized agency must present to such judge or surrogate a schedule to be annexed to the petition which shall be verified by a duly constituted official of the authorized agency having custody of the adoptive child or actually placing the child for adoption and shall contain (1) the full name of the child, (2) the manner in which the authorized agency obtained custody of the adoptive child, and (3) the facts, if any, which render unnecessary the consent of either or both of the parents of the adoptive child.

4. None of the papers in the proceeding shall state the surname of the child in the title and no petition,

Portions of Domestic Relations Law -- State of New York (McKinney's Consolidated Laws of New York (Book 14)).

agreement, consent, affidavit, nor any other document which is required to be signed by the adoptive parents shall contain the surname of the adoptive child.

6. Where the adoptive child is less than eighteen years of age, no order of adoption shall be made until such child has resided with the adoptive parents for at least six months unless the judge or surrogate in his discretion shall dispense with such period of residence and shall recite in the order the reason for such action.

* * * * * * *